Nos. 486 and 487

In the Supreme Court of the United States

October Term, 1938

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

METROPOLITAN EDISON COMPANY

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PENNSYLVANIA WATER & POWER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals in the *Metropolitan Edison Company* case (R. 29–44) is reported in 35 B. T. A. 1110, and that

of the Circuit Court of Appeals (R. 50–55) is reported in 98 F. (2d) 807. The opinion of the Board of Tax Appeals in the *Pennsylvania Water & Power Company* case (R. 16–25) is reported in 36 B. T. A. 467, and that of the Circuit Court of Appeals (R. 45–47) is reported in 98 F. (2d) 812.

JURISDICTION

The judgments of the Circuit Court of Appeals in the two cases were entered August 23, 1938. (*Metropolitan Edison Company case,* R. 55; *Pennsylvania Water & Power Company* case, R. 48.) A single petition for writs of certiorari in the two cases was filed November 23, 1938, and was granted January 3, 1939. (No. 486 R. 55, No. 487 R. 48.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The taxpayer, a Pennsylvania corporation, acquired all of the assets of its wholly owned subsidiary in consideration of the delivery to the subsidiary of all of the subsidiary's capital stock and the assumption by the taxpayer of all of the subsidiary's indebtedness. This transaction was carried out in accordance with Section 595, Title 15, Purdon's Pennsylvania Statutes, *infra*. The taxpayer, the parent company, retired bonds issued at a discount by its former subsidiary. Is the taxpayer entitled to deduct from its gross income the

unamortized bond discount and expense in the year of the retirement of the bonds?

2. The facts are the same as in Question 1, except that the transaction was not carried out under any Pennsylvania statute and the subsidiary was not immediately dissolved. Is the taxpayer entitled to deduct the unamortized bond discount and expense in the year of the retirement of the bonds?[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendices A and B, *infra*, pp. 54–65.

STATEMENT

The facts in these cases are not in dispute and as found by the Board of Tax Appeals are as follows:

METROPOLITAN EDISON CASE

The taxpayer, the Metropolitan Edison Company, is a Pennsylvania corporation, engaged in the business of supplying electric light and power in Reading, Lebanon, and surrounding territory. Through affiliated subsidiaries it also operates a unified system of electric properties which serve other communities in Pennsylvania and northern Maryland. It filed consolidated returns in behalf of itself and its subsidiaries for the years 1927 and 1928. (R. 31.)

[1] The first question is presented in both cases. The *Metropolitan Edison Company* case presents also the second question.

The Metropolitan Power Company, also a Pennsylvania corporation, was organized in 1923 as a wholly owned subsidiary of the taxpayer to erect and operate a large electric generating plant for the manufacture of electric energy in and adjoining the Borough of Middletown, Dauphin County, Pennsylvania, and for the distribution and sale at the plant of such electric energy. All of the electricity generated at its plant was sold to the taxpayer under a contract whereby the taxpayer was to pay therefor an amount sufficient to enable the Metropolitan Power Company to earn costs of operation and other charges, including depreciation, taxes, and interest. (R. 31–32.)

The Metropolitan Power Company was organized as a separate corporation in order to finance the construction of the generating plant through a first mortgage. The taxpayer in 1923 purchased and guaranteed and sold to the public a $3,250,000 bond issue of the Metropolitan Power Company, purchased all of its stock and loaned to that company on open account approximately $3,000,000. The bonds in question were issued to the taxpayer at 90, and after endorsement and guarantee by the taxpayer were sold to the public at the same price. (R. 32.)

On February 15, 1927, the Public Service Commission of the State of Pennsylvania issued a Certificate of Public Convenience authorizing the Metropolitan Power Company to sell all of its prop-

erty except public franchises to the taxpayer.[2] The actual transfer occurred on February 28, 1927, the assets and liabilities of the Metropolitan Power Company as they stood on its books being transferred to the taxpayer's books and a deficit from operations being charged against the latter's surplus. On the same day the taxpayer surrendered the stock of the Metropolitan Power Company for cancellation and that company became inactive. It was dissolved on January 8, 1928. Also on February 28, 1927, the taxpayer assumed liability for the Metropolitan Power Company's $3,250,000 First Mortgage Gold Bonds, the payment of which it had originally guaranteed, and the intercorporate debt of the Metropolitan Power Company to the taxpayer in the approximate sum of $3,000,000 was cancelled. (R. 32.)

The bonds in question were callable on thirty days' published notice at 107½%; and pursuant to the terms of the indenture they were called for redemption and redeemed during 1927, the taxpayer paying a premium of $243,645 on their retirement. (R. 32–33.)

At the time of the redemption of the bonds in question there remained of the discount and expense incurred on the issuance of the bonds the sum of $308,097.90, unamortized by annual deductions.

[2] In that connection the Board of Tax Appeals made the following finding (R. 32): "The petition specifically states that the Power Co. had no public franchises; and for that reason a sale was resorted to rather than a merger."

R. 33.) The Commissioner refused to permit this amount to be deducted in the return of the taxpayer for 1927. (R. 30.)

During the year 1928 the taxpayer also retired at a premium certain bonds of the Cumberland Valley Light & Power Company, the York Haven Water & Power Company, the Hanover Power Company, and the Pennsylvania Edison Company, all of which were Pennsylvania corporations. (R. 34–35.) Those companies also were former subsidiaries of the taxpayer, whose obligations it had assumed when it took over their assets pursuant to so-called mergers of those companies with the taxpayer, effected under the Act of the General Assembly of the Commonwealth of Pennsylvania, enacted April 29, 1874, and the amendments and supplements thereto. See Section 595, Title 15, Purdon's Pennsylvania Statutes, Appendix B, *infra,* p. 64.[2] In each instance the documents relating to the transfer of assets to the taxpayer referred to the transaction as a sale of assets by the subsidiary to the parent corporation. (R. 34–35, 41.)

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[2] The provision in question is the Act of April 29, 1874, P. L. p. 73, section 23, as amended by the Act of April 17, 1876, P. L. p. 30, section 5, and the Act of June 2, 1915, P. L. p. 724, section 1. An inadvertent error at R. 35 refers to the last Act as that of April 2, 1915. Although the manner of presentation in the findings might suggest otherwise, the assets of each company were acquired pursuant to the same statute.

At the time these obligations were redeemed there existed with respect to them unamortized discount and expense in the aggregate sum of $752,481.26. (R. 34.)[4] The Commissioner of Internal Revenue declined to permit the deduction of that amount in the taxpayer's return for 1928. (R. 30, 34.)

On the basis of the disallowance of the deductions for unamortized discount and expense relating to these bonds and the Metropolitan Power Company bonds, and because of other adjustments not here involved, the Commissioner determined deficiencies of $101,395.24 and $320,017.64 for 1927 and 1928, respectively. (R. 30.)

Upon appeal the Board of Tax Appeals sustained the Commissioner on these issues (R. 39–41) and determined deficiencies of $21,657.13 and $78,620.55 for 1927 and 1928, respectively. (R. 44.)[4]

The Circuit Court of Appeals reversed the Board. It held that the transactions by means of which the taxpayer acquired the assets and assumed the liabilities of the Cumberland Valley Light & Power Company, the York Haven Water & Power

[4] It should be noted that the Board (R. 41–43) held that the taxpayer might deduct unamortized bond discount and expense with respect to bonds issued by another subsidiary, the Metropolitan Electric Company, for the reason that in that instance there was a strict merger or consolidation pursuant to the Act of May 3, 1909, P. L. 408, Sec. 1. (See Section 421, Title 15, Purdon's Pennsylvania Statutes (Appendix B, *infra*, p. 61).) Messrs. Sternhagen and Murdock dissented upon that issue. (R. 41–42.)

Company, the Hanover Power Company, and the Pennsylvania Edison Company, pursuant to the short-form merger statute had all of the elements of a true merger; that the subsidiaries ceased to exist by operation of law; that the taxpayer, an existing corporation before the merger, continued to exist thereafter and became liable for the debts of the absorbed corporations, both under the contract and by operation of law; and hence that it could deduct the unamortized bond discount and expense with respect to the bonds of those subsidiaries. (R. 51–52.)

The court held further that while the procedure by which the taxpayer acquired the assets and assumed the liabilities of the Metropolitan Power Company was not within the provisions of any merger statute, the essential elements of such a merger were present, it not being material that the Power Company did not automatically cease to exist upon completion of the transaction, since it was left without stockholders or property and there was a *de facto* dissolution. Accordingly, the court held that the unamortized bond discount and expense with reference to the Metropolitan Power Company bonds could be deducted. (R. 53-55.)

PENNSYLVANIA WATER COMPANY CASE

The taxpayer, the Pennsylvania Water & Power Company, is a Pennsylvania corporation organized in 1910. (R. 17, 34.)

Prior to 1924, the taxpayer generated all electricity sold by it exclusively by water power at its hydroelectric plant located on the Susquehanna River at Holtwood, Pennsylvania. In that year it became necessary for the taxpayer to secure an auxiliary supply of electrical energy generated by steam, and since its counsel believed that its charter did not permit it to operate a steam plant, it organized, for that purpose, under the laws of Pennsylvania, a subsidiary corporation, the Holtwood Power Company. (R. 17.)

The latter company was incorporated on August 9, 1924, with an authorized capital of $1,500,000 consisting of 15,000 shares of the par value of $100 each. All of these shares were purchased by the taxpayer, but 50 of them were placed in the names of seven qualifying directors, the taxpayer retaining equitable ownership. (R. 17.)

With the amount realized from the sale of the capital stock and the proceeds of the sale of a bond issue hereinafter mentioned, the Holtwood Company erected an auxiliary steam generating plant adjacent to the taxpayer's hydroelectric plant. (R. 17–18.)

By an agreement between the two companies dated August 26, 1924, and effective until January 1, 1975 (R. 34–36), the subsidiary agreed to purchase certain land from the taxpayer (the purchase price of which was 5,000 shares of the subsidiary's stock), to erect and operate a steam plant thereon,

and to deliver, on the order of the taxpayer, electr
power up to full capacity of the plant. As com
pensation for such power, the taxpayer agreed t
pay: all expenses and costs; an allowance for de
preciation; a sum to provide for amortization o
debt discount and security issue expense and ex
penses attending the issuance, registration an
transfer of the capital stock and bonds then o
thereafter issued and outstanding; all interest o
bonds or other indebtedness; and a sum sufficien
to provide a net return of 8% annually upon th
Holtwood Company's stock. (R. 18, 34–36.) I
was stated that the intent of the agreement was t
enable the subsidiary to realize a net return of 8%
annually upon the par value of all of its securi-
ties at any time outstanding. (R. 35–36.)

From the date of the completion of the plant on
August 16, 1925, to December 21, 1927, all electric
energy generated at the steam plant was delivered
to the taxpayer. The taxpayer's officers and em-
ployees managed the plant without compensation
from the subsidiary and it was operated as a de-
partment of the taxpayer. (R. 18.)

As previously indicated, funds for construction
of the plant were secured in part by the sale of
bonds. All of the subsidiary's property was trans-
ferred to the New York Trust Company, as trustee,
to secure a bond issue which was not to exceed
$25,000,000, the bonds to be issued in series. It was
provided that "Series A", limited to $2,750,000 and

bearing 6% interest, should be dated September 1, 1924, should mature September 1, 1954, and might be redeemed on various dates, at various premiums. (R. 18–19.)

The subsidiary issued the "Series A" bonds at a discount of $137,500, and incurred an expense of $25,249.87 in issuing them. Deductions for amortized bond discount and expense were claimed in the consolidated returns of the taxpayer and its affiliate for the years 1924 to 1927, inclusive. Because of the taxpayer's obligation to make payments to the subsidiary for those items, which payments were deductible by the taxpayer as business expenses, the subsidiary reported such payments as income. (R. 19.)

On October 4, 1927, the taxpayer surrendered its corporate power to store, transport and supply water, in order to be in a position to effect a merger or consolidation with its subsidiary in accordance with the rules laid down in *Y. Hav. W. & P. Co.* v. *Pub. Serv. Com.*, 287 Pa. 241. Thereafter a "short-form of merger" was effected pursuant to the Pennsylvania statute previously mentioned. (See Section 595 of Title 15 of Purdon's Pennsylvania Statutes, Appendix B, *infra*, p. 64.) (R. 19–20.)

Pursuant to the procedure described in those provisions the subsidiary, by deed dated December 21, 1927, transferred all of its franchises and property, real, personal and mixed, to the taxpayer, the sole consideration for the transfer being the de-

livery to the subsidiary of all its capital stock held by the taxpayer, and the taxpayer's assuming the indebtedness of the subsidiary. Thereupon the subsidiary ceased to exist. This transfer was treated by the Commissioner as a non-taxable transaction giving rise to no gain or loss. (R. 20.)

On March 1, 1928, the taxpayer sold to the public a $6,000,000 issue of its own bonds for the purpose of retiring some of its own bonds and the Holtwood bonds. The latter were retired on March 1, 1928, at a 7% premium, amounting to $192,500. (R. 20.)

On January 1, 1928, the unamortized discount and expense applicable to the Holtwood Bonds was $145,159.52. (R. 21.)

In its income tax return for 1928 the taxpayer claimed a deduction of $904.42 for amortization of bond discount and expense for the period January 1, 1928, to February 28, 1928, and a deduction for unamortized discount and expense, as of the date of retirement, in the amount of $144,255.10. (R. 21.)

The Commissioner disallowed these deductions, made certain other adjustments which are not material here, and determined a deficiency of $86,508.25, but made claim for a deficiency of only $39,675.82 at the trial. (R. 17.)

Upon appeal the Board of Tax Appeals sustained the Commissioner's determination on the issue here involved and found a deficiency of $16,575.82. (R. 25.)

The Circuit Court of Appeals reversed the Board, holding that its decision in the *Metropolitan Edison Company* case, rendered the same day, controlled this case, and hence that the deduction should be allowed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that a transfer of assets from one Pennsylvania corporation to another by an agreement pursuant to Section 595, Title 15, of Purdon's Pennsylvania Statutes effects a merger or consolidation. (Nos. 486 and 487.)

2. In holding that where the successor corporation under such a contract agrees to pay the transferor's debts, it is liable for such debts by operation of law. (Nos. 486, 487.)

3. In holding that the Metropolitan Edison Company was merged or consolidated with the Cumberland Valley Light & Power Company, the York Haven Water & Power Company, the Hanover Power Company, and the Pennsylvania Edison Company, or with any one of those companies. (No. 486.)

4. In holding that the Metropolitan Edison Company became liable for the debts of those companies by operation of law. (No. 486.)

5. In holding that when bonds issued by those corporations are redeemed by the Metropolitan Edison Company, that company should be allowed

a deduction for the unamortized discount and expense. (No. 486.)

6. In holding that there was a merger or consolidation of the Pennsylvania Water & Power Company and the Holtwood Power Company. (No. 487.)

7. In holding that the Pennsylvania Water & Power Company became liable for the debts of the Holtwood Power Company by operation of law. (No. 487.)

8. In holding that when bonds issued by the Holtwood Company are redeemed by the Pennsylvania Water & Power Company, that company may deduct the unamortized bond discount and expense. (No. 487.)

9. In holding that the Metropolitan Edison Company became liable for the debts of the Metropolitan Power Company by operation of law. (No. 486.)

10. In holding that when bonds issued by the Metropolitan Power Company are redeemed by the Metropolitan Edison Company, that company is entitled to deduct unamortized bond discount and expense. (No. 486.)

SUMMARY OF ARGUMENT

In 1928 the taxpayers in these two cases redeemed at a premium before maturity certain bonds which had been issued at a discount by other corporations whose assets they had acquired and whose liabilities they had assumed by agreements

entered into pursuant to Section 595, Title 15, of Purdon's Pennsylvania Statutes (Appendix B, *infra*, p. 64). The court below permitted them to deduct the portion of the bond discount and expenses incurred in issuing the bonds which had not previously been amortized, upon the theory that the taxpayers had been merged with the corporations that issued the bonds, and hence were entitled to the deductions.

The decided cases establish the general rule that only the corporation which issues the bonds may deduct amortization of bond discount and expense, and that a corporation which has acquired the assets and agreed to assume the liabilities of the corporation which issued the bonds may not do so. The only recognized exception to the rule is that the deduction will be allowed where there has been a merger or consolidation under a state statute which makes the transferee liable by operation of law for the debts of the transferor and which continues the existence of the transferor within the transferee.

These cases do not come within the exception. Section 595 refers to sales of assets and not to mergers or consolidations. It does not provide that the purchaser shall become liable for the seller's debts by operation of law, and does not continue the corporate life of the seller within the purchaser. The only Pennsylvania case dealing with the question whether the purchaser becomes

liable for the debts of the seller holds that it does not and that the seller continues to have an independent existence until it is dissolved, when its existence ceases altogether. The decision of the court below holding to the contrary is in conflict with that decision and with the decision of another Circuit Court of Appeals.

The applicable statutes and regulations do not permit any further exceptions. Corporations are separate entities for tax purposes and there is no authority for holding that a successor corporation may claim deductions for bond discount and expenses which its predecessor might have claimed had it continued to exist. Under the statutes and regulations and the decided cases dealing with deductions generally, there is support for the view that even where a corporation acquires the assets of another pursuant to a true merger or consolidation, it is a different taxpayer and it may not claim deductions to which its predecessor was entitled. But in dealing with the question of deductions for amortization of bond discount and expenses, the courts have not gone so far. They have held that where there is a true merger or consolidation having the consequences hitherto described the deduction may be allowed to the successor, upon the theory that the successor has continued the life of the corporation which issued the bonds and is to be regarded as the same taxpayer. The theory cannot be applied in cases where there is a sale or even

where there is a merger or consolidation which does not have the consequence of continuing the existence of the corporation which issued the bonds.

There is no other theory upon which the courts could have justified any exception and no theory on which any additional exceptions may be sustained. There is no basis for the argument that the successor considered as an independent entity has sustained a loss. The theory upon which the deduction for amortization of bond discount and expense is based is that the discount and expense have resulted in the issuing corporation's realizing less from the sale of the bonds than it will be obliged to pay the bondholders at maturity. If it subsequently redeems the bonds at par or at a premium before maturity, it may write off the rest of the loss at that time. But if the corporation that redeems the bonds did not issue them, the two elements in the transaction which give rise to the loss are not present. The successor did not incur any expense in issuing the bonds; it did not issue them at a discount, and it did not receive the proceeds of their sale. It therefore cannot establish its right to the deduction.

In 1927 the Metropolitan Edison Company redeemed at a premium bonds issued by another corporation whose assets it had acquired and whose liabilities it had assumed. That transfer was not carried out pursuant to Section 595 or any other Pennsylvania statutes, and was consequently not a

merger or consolidation in any sense in which those terms are used. The allowance of the deduction of the unamortized bond discount and expense with respect to those bonds is clearly not warranted under the statute, the regulations, or the decided cases.

ARGUMENT

I

THERE WERE NO TRUE MERGERS IN THESE CASES, AND HENCE THEY DO NOT COME WITHIN THE ONLY RECOGNIZED EXCEPTION TO THE ESTABLISHED RULE THAT A CORPORATION MAY NOT DEDUCT AMORTIZATION OF BOND DISCOUNT AND EXPENSE WITH RESPECT TO BONDS ISSUED BY A PREDECESSOR WHOSE LIABILITIES HAVE BEEN ASSUMED BY AGREEMENT

In 1928 the Metropolitan Edison Company and the Pennsylvania Water & Power Company retired at a premium before maturity certain bonds issued by subsidiaries whose assets they took over and whose liabilities they assumed by agreements made pursuant to Section 595, Title 15, of Purdon's Penns' 'vania Statutes (Appendix B, *infra*, p. 64), which in terms refers to sales but which is sometimes called the Short-Form Merger Statute. The court below allowed them to deduct the discount and expense applicable to the bonds which had not been amortized up to the time of their retirement.

The Metropolitan Edison Company was also allowed similar deductions for 1927 with respect to

bonds issued by the Metropolitan Power Company, whose assets it acquired and whose liabilities it assumed by an agreement which was not entered into pursuant to any statute. The allowance of the deduction with respect to those bonds will be dealt with separately in Point III hereinafter, as in other respects the two cases present identical questions, arise under the same statute (Revenue Act of 1928), and involve no differences in fact that are material. For convenience the argument is based largely upon the facts in the Metropolitan Edison Company case and all references to the record will be understood as referring to the record in that case unless otherwise indicated.

The courts have hitherto consistently held that the mere fact that a corporation has taken over the assets and assumed the liabilities of another corporation does not permit it to deduct amortization of discount and expense with respect to bonds issued by a predecessor. *Turner-Farber-Love Co.* v. *Helvering,* 68 F. (2d) 416 (App. D. C.). (That case was cited with approval by the Supreme Court in *New Colonial Co.* v. *Helvering,* 292 U. S. 435); *General Gas & Elec. Corp.* v. *Commissioner,* 98 F. (2d) 561 (C. C. A. 2d), now pending before this Court, Nos. 492–493, present Term; *American Gas & Elec Co.* v. *Commissioner,* 85 F. (2d) 527 (C. C. A. 2d); *American Gas & Electric Co.* v. *United States,* 17 F. Supp. 151 (C. Cls.). The only exception which has been recognized is that when there has been a true merger or consolidation, the

life of the corporation issuing the bonds continuing in the successor and the successor becoming liable for the debts of the issuing corporation by operation of law, the successor has been allowed the deduction. *American Gas & Elec. Co.* v. *Commissioner, supra; American Gas & Electric Co.* v. *United States, supra; New York Cent. R. Co.* v. *Commissioner*, 79 F. (2d) 247 (C. C. A. 2d), certiorari denied, 296 U. S. 653; *Western Maryland Ry. Co.* v. *Commissioner*, 33 F. (2d) 695 (C. C. A. 4th)[5]. See also *Illinois Power & Light Corp.* v. *Commissioner*, 33 B. T. A. 1189; *Connecticut Electric Co.* v. *Commissioner*, 35 B. T. A. 444. Thus the courts have denied the deduction where there was admittedly a non-taxable reorganization but not a true merger or consolidation. *American Gas & Elec. Co.* v. *Commissioner, supra; American Gas & Electric Co.* v. *United States, supra.*

The court below held that the transactions by which the Metropolitan Edison Company took over the assets and assumed the liabilities of the Cumberland Valley Light & Power Company, the York Haven Water & Power Company, the Han-

[5] Although there is language in the *Western Maryland Ry. Co.* case which might be construed as defining the exception more broadly, the court which decided that case subsequently stated that its application was limited to cases where there was a strict merger or consolidation (*Brandon Corp.* v. *Commissioner*, 71 F. (2d) 762 (C. C. A. 4th)), and other courts have so interpreted the decision (*American Gas & Elec. Co.* v. *Commissioner, supra; Turner-Farber-Love Co.* v. *Helvering, supra*).

over Power Company, and the Pennsylvania Edison Company effected mergers under Section 595 of Title 15 of Purdon's Pennsylvania Statutes, *infra;* that such mergers had all of the essential elements of a true merger, in that the subsidiaries ceased to exist by operation of law and the taxpayer, an existing corporation before the alleged merger, continued to exist thereafter and became liable for the debts of the absorbed corporation, both under the contract and by operation of law; and hence that it could deduct the unamortized bond discount and expense with respect to the bonds of its subsidiaries. It applied the same reasoning in the *Pennsylvania Water & Power Company* case.[6]

On substantially identical facts the Circuit Court of Appeals for the Second Circuit held in *General Gas & Elec. Corp.* v. *Commissioner, supra,* that a transaction carried out pursuant to Section 595 did not effect a true merger or consolidation, and hence that the deduction was not allowable. Both courts conceded that that question was to be determined under the laws of Pennsylvania and both considered that the decision of the Supreme Court of Pennsylvania in the case of *Merwine* v. *Mt. Pocono Light & Imp. Co.,* 304 Pa. 517, had held that any liability of the purchasing corporation under

[6] In that case the Pennsylvania Water & Power Company acquired the assets of the Holtwood Power Company and agreed to assume its liabilities in a transaction carried out pursuant to Section 595. (R. 20.)

the Pennsylvania statute in question rested upon the principles governing fraudulent conveyances.

Section 595 of Purdon's Pennsylvania Statutes (Appendix B, *infra*, p. 64) had its origin in Section 23 of the Act of April 29, 1874, as amended by Section 5 of the Act of April 17, 1876. It relates generally to reductions in capital stock, changes in the value of shares, and conveyances of franchises and property upon a vote of the stockholders taken in the manner prescribed in other sections. In so far as material here, it provides that—

> * * * it shall be lawful for any corporation in the same manner to sell, assign, dispose of and convey to any corporation created under or accepting the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid: * * *

It should be noted that this statute in terms applies to sales and not to mergers or consolidations, and that it does not provide that the purchasing corporation shall assume the debts of the seller. It leaves all of the conditions of the transfer to be fixed by agreement between the parties. In those respects it is in direct contrast with Sections 421-423 of Purdon's Pennsylvania Statutes[7] (Appen-

[7] The origin of those statutes is to be found in the Act of May 3, 1909, P. L. 408.

dix B, *infra*, pp. 61–63), which relate specifically to the merger and consolidation of companies. Section 423 provides—

> That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts not of record, duties, and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties, and liabilities had been contracted by it.

No suggestion is made that the transactions in these cases did not conform to the pattern prescribed by Section 595. The Board of Tax Appeals pointed out that in each instance the documents showing the details of the various transactions by which the Metropolitan Edison Company acquired the assets and assumed the liabilities of the subsidiaries referred to the transactions as sales. (R. 41.)

We submit that transfers effected under Section 595 constitute sales and not mergers; but in any event they do not have the characteristics of a true merger within the rules heretofore laid down by the decisions dealing with the issue here involved.

It is apparent upon the face of Section 595 that transfers made under it do not effect a merger or consolidation, but any doubt on that subject is resolved by a consideration of the decision in *Merwine* v. *Mt. Pocono Light & Imp. Co., supra.*

In that case the plaintiff sued the Mt. Pocono Light & Improvement Company to recover damages for personal injuries sustained as the result of negligent acts of that company. Subsequent to the institution of the suit the defendant, with the approval of the Public Service Commission, had sold all of its assets to the Pennsylvania Power & Light Company under the authority of the statutes here involved, but the latter company had not agreed to assume its debts. The defendant asked that the action be abated and the plaintiff filed an answer asking for a rule to show cause why the Pennsylvania Power & Light Company should not be substituted as a party defendant. The trial court denied the substitution and abated the action against the Mt. Pocono Light & Improvement Company. The appellate court held that the trial court properly refused to substitute the successor corporation as a party defendant, but that the old company continued to have an existence for the payment of the claim for damages, which was asserted before the sale was made, and that the action should not have been abated. In so holding the court was careful to point out that a corporation whose assets are sold under Section 3 of the Act of

April 29, 1874, as amended by the Act of April 17, 1876 (Section 595, Purdon's Pennsylvania Statutes, *infra*), continues in existence as an inactive corporation until its dissolution. The court said (pp. 522–523):

> Defendant corporation not having been legally dissolved, its present condition is rather that of an inactive corporation and it is not altogether dead. Before a corporation has ceased to exist in the absolute sense here contended for, it must fully and definitely close its affairs, and the fact that a corporation has "ceased to do business" does not preclude it from exercising its various rights to accomplish this purpose: *Stern, etc.*, v. *Smith & Co.*, 273 Pa. 39, 41. Even though the charter of a corporation has expired,—and certainly defendant's has not done so,—the Act of Assembly of May 21, 1881, P. L. 30, continues its corporate existence to the extent that suits already brought by creditors may be maintained and defended.

It is clear that in refusing to substitute the Pennsylvania Water & Power Company as a party, and in requiring the plaintiff to sue the old company, which had no assets, the court recognized that the purchaser of the assets was not liable for the debts of the seller by operation of law. Obviously, if it had thought otherwise, the court would have permitted the substitution of the purchaser as defendant, and would not have compelled the claimant to

sue the seller. The court did suggest, but did not decide, that because of the circumstances under which the sale was made, such as the identity of the officers of the two corporations, the purchaser might be liable for the debts of the seller, but made no suggestion that it was liable under the statute itself. The exact language of the court was as follows (pp. 524–525):

> Although we need not decide the point, it is proper to call attention to the fact that the pleadings indicate that the Pennsylvania Power & Light Company took over the property of defendant under circumstances warranting a finding, upon evidence produced to support the allegations in the pleadings, that the transaction between the two corporations was in reality a merger, or such union of interests as, in law, caused the buying corporation to assume defendant's obligations. There is much to show that the purchase was attended by an intimacy of interest tending to render the transaction, in so far as the Pennsylvania Power & Light Company's interest was concerned, a purchase *cum onere*. For instance, it is averred that, at the time of the commission of the alleged negligent acts on the part of the Mount Pocono Light & Improvement Company, it was affiliated or associated with the Pennsylvania Power & Light Company to the extent that both companies were managed, operated and controlled under the same management and system. It is admitted that the common stock

of both companies was owned by the same holding company, and, by defendant's own showing, thirteen of the same persons were officers or directors in both companies. It further appears that both companies operated from the same office. Plaintiff states that the business of the Mount Pocono Company was conducted by the agents, servants and employees of the Pennsylvania Power & Light Company; that after the sale, the power company took over and operated the business formerly conducted by defendant; and that the sale was merely a formality giving effect to a union of the companies which had in reality occurred previous to the accident upon which the suit is based. *Whatever the liability of the Pennsylvania Power & Light Company may or may not prove to be, we pass that point and note that the proper course at the present state of proceedings requires plaintiff first to proceed to judgment against defendant if she can, and, having secured judgment, to levy where defendant's assets liable for the judgment may be found.* [Italics supplied.]

It is obvious that by its reference to a purchase *cum onere* the court meant that the purchaser might be held liable upon the principle of a fraudulent conveyance, and only upon that principle. The Circuit Court of Appeals for the Second Circuit so construed the decision in *General Gas & Elec. Corp.* v. *Commissioner, supra,* and the court below apparently conceded that the *Mt. Pocono Light & Imp. Co.* case, *supra,* did stand for that principle.

The court below gave no reason for refusing to follow the decision in the *Mt. Pocono* case and cited no authority in support of its view that the successor corporation becomes liable for the debts of the predecessor under Section 595. For the most part, it relied upon the fact that transactions under Section 595 had often been referred to by the Pennsylvania courts as mergers, and for a long time there was no other merger statute, Sections 421-423, *infra* (sometimes referred to as the Long Form Merger Statutes), merely providing for consolidations.

Taxpayers' counsel argued in the court below that if a successor corporation is liable for the debts of a predecessor on any principle, it is liable by operation of law. It is clear that that is not what the courts have meant by that phrase. The fact that a corporation may be liable for the debts of its predecessor upon the principle of a fraudulent conveyance or under the trust fund doctrine, or because it has contracted to pay those debts, does not mean that it is liable by operation of law. In the first instance the remedy is an equitable remedy and in the second, if the creditor is permitted to sue the successor directly, it is only as the third party beneficiary of a contract. It is only where the statute governing consolidations or mergers requires the successor to assume the debts and permits that corporation to be sued upon them as if they were its own debts, that there is a liability by

operation of law. *American Gas & Elec. Co.* v. *Commissioner, supra; American Gas & Electric Co.* v. *United States, supra.* See also *Guaranty Trust Co.* v. *N. Y. & Q. C. Ry. Co.*, 253 N. Y. 190.

It should be noted that the decision in *Merwine* v. *Mt. Pocono Light & Imp. Co., supra,* also recognizes that a corporation which has sold its assets pursuant to Section 595 continues its independent existence until it is formally dissolved. That fact is wholly inconsistent with the view that the purchaser continues the existence of the seller within itself. The court below did not state that the law was otherwise. It stated that the seller ceased to exist altogether, but apparently thought that that was immaterial since the purchaser (the taxpayer) existed both before and after the transaction. It thus ignored completely the theory on which cases of this character have previously been decided. The corporations whose identity was required to be preserved in the successor corporation in order to justify the allowance of the deductions claimed were the sellers, not the purchaser. *American Gas & Elec. Co.* v. *Commissioner, supra; American Gas & Electric Co.* v. *United States, supra; General Gas & Elec. Corp.* v. *Commissioner, supra.*

It is true that transactions under Section 595 have been referred to in some Pennsylvania decisions as mergers. *Penna. Utilities Co.* v. *Pub. Serv. Com.*, 69 Pa. Super. Ct. 612; *Hey* v. *Springfield Water Co.*, 207 Pa. 38; *Y. Hav. W. & P. Co.* v.

Pub. Serv. Com., 287 Pa. 241. But they have been referred to in many other cases as sales. *Greensburg Borough* v. *W. Water Co.*, 240 Pa. 481; *Koehler* v. *St. Mary's Brew. Co.*, 228 Pa. 648; *Carr* v. *Rochester Tumbler Co.*, 207 Pa. 392; *Maxler* v. *Freeport Bank*, 275 Pa. 510; *Ringler* v. *Atlas Portland C. Co.*, 301 Pa. 176; *Buist's Estate*, 297 Pa. 537. It should be noted that the opinion in the *Buist's Estate* case was written by Justice Kephart, who also wrote the opinion in two cases relied upon by the court below. *Penna. Utilities Co.* v. *Pub. Serv. Com., supra; Y. Hav. W. & P. Co.* v. *Pub. Serv. Com., supra.* In *Buist's Estate, supra*, which was later in point of time, Justice Kephart said (p. 541):

> Care should be taken to distinguish consolidation from proceedings under the Act of 1876, P. L. 33, often referred to as a "short form merger" (See *York Haven W. & P. Co.* v. *Pub. Ser. Com.*, 287 Pa. 241); its operation in reality effects a sale of all the company's assets.

In any event, it is not material what name is given to transfers effected under Section 595 by the Pennsylvania decisions. *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110. It would not matter if Section 595 itself referred to transactions thereunder as mergers, if they were not true mergers having the characteristics which the courts have hitherto found essential for a successor corpo-

ration to take deductions for amortization of bond discounts and expense with respect to bonds issued by its predecessor. As hitherto pointed out, those essentials are that the existence of the issuing corporation be perpetuated in the successor and that the latter become liable for the debts of the former by operation of law and not by agreement. The court below cited no cases supporting the view that that is the law of Pennsylvania. The statute itself does not provide that a sale under Section 595 has that result, and the only decision in point (*Merwine v. Mt. Pocono Light & Imp. Co., supra*) is to the effect that it does not.

It is no answer to these facts to suggest, as did the court below, that under the Long Form Merger statute as well as under this statute the new corporation is a different entity and the absorbed corporation ceases to exist. The vital distinction between a merger under the Long Form Merger statute and a sale under the so-called Short Form Merger statute apparently is that under the former, while the absorbed corporation ceases to exist as an independent entity, it continues to exist within the successor corporation, whereas this is not true under the Short Form Merger statute involved in this case. It may be that the deduction would not be allowable even if there had been a merger under the Long Form Merger statute in these cases. But even if it were allowable under

the Long Form Merger statute, that fact is immaterial here.[8]

We submit, therefore, that the transactions carried out under Section 595 in these cases do not constitute true mergers or consolidations and that under principles established in the decided cases dealing with the question here involved the deductions claimed are not allowable.

II

THE RULE THAT HAS HITHERTO BEEN ESTABLISHED IN THIS TYPE OF CASE IS FUNDAMENTALLY SOUND AND NO FURTHER EXCEPTIONS SHOULD BE CREATED

In Point I of the Argument we have shown that it is the established rule that a corporation which has taken over the assets and agreed to assume the liabilities of another corporation cannot deduct amortization of bond discount and expense with respect to bonds issued by the latter corporation. *Turner-Farber-Love Co.* v. *Helvering,* 68 F. (2d)

[8] It should be noted, however, that Section 423 (Appendix B, *infra*, p. 63) does make the successor liable for the debts of the predecessor by operation of law. The Board of Tax Appeals held that the Metropolitan Edison Company could deduct amortization of bond discount and expense with reference to the bonds of the Metropolitan Electric Company, where there was a merger under Section 421, *infra*. Messrs. Sternhagen and Murdock dissented on that issue. (R. 43–44.) See also *Pennsylvania Co., Etc.*, v. *Commissioner*, 75 F. (2d) 719 (C. C. A. 3d), holding that the successor could not deduct a loss sustained by a predecessor absorbed under Section 421.

416 (App. D. C.); *American Gas & Elec. Co.* v. *Commissioner,* 85 F. (2d) 527 (C. C. A. 2d); *American Gas & Electric Co.* v. *United States,* 17 F. Supp. 151 (C. Cls.). We have also shown that the only recognized exception to that rule is that the deduction will be granted where there is a true merger or consolidation, the successor becoming liable for the debts of the issuing corporation by operation of law and essentially preserving the latter's continuity of existence. *American Gas & Elec. Co.* v. *Commissioner, supra; Western Maryland Ry. Co.* v. *Commissioner,* 33 F. (2d) 695 (C. C. A. 4th); *New York Cent. R. Co.* v. *Commissioner,* 79 F. (2d) 247 (C. C. A. 2d), certiorari denied, 296 U. S. 653; *American Gas & Electric Co.* v. *United States, supra.*

For reasons stated in Point I, this case does not come within that exception. Hence the only remaining question is whether the established rule is sound and whether the creation of additional exceptions is justified by the applicable statutes and the regulations.

The Revenue Act of 1928, like previous revenue statutes, contains no specific mention of bond discount and expense and makes no provision for their amortization. *Helvering* v. *Union Pacific Co.,* 293 U. S. 282. The statute provides merely that in computing net income corporations shall be entitled to deduct all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, all interest paid or

accrued within the taxable year on indebtedness, and all losses sustained during the taxable year and not compensated for by insurance or otherwise. See Section 23 (a), (b), and (f) of the Revenue Act of 1928 (Appendix A, *infra*, p. 54). And in substance these statutes provide that deductions shall be taken for the taxable year in which paid or accrued, or paid or incurred, dependent upon the method of accounting employed in computing net income, unless in order to clearly reflect the income, they should be taken as of a different period. See Sections 41, 42, and 43, Revenue Act of 1928, *infra*.

The Treasury Regulations, however, beginning with Article 150 of Regulations 33, promulgated under the Revenue Act of 1916, have consistently provided that where a corporation issues bonds at a discount, the net amount of the discount is deductible and should be prorated over the life of the bonds. See Article 68 of Regulations 74 (Appendix A, *infra*, p. 58), and Article 545 of Regulations 69 (Appendix A, *infra*, p. 60). Previous regulations to the same effect have been sustained by this Court, and it is no longer open to question that a corporation issuing bonds at a discount is entitled to deductions for their amortization over the life of the bonds. *Helvering* v. *Union Pacific Co.*, 293 U. S. 282; *Old Mission Co.* v. *Helvering*, 293 U. S. 289. Upon like principles this Court has held that expenses incurred in issuing bonds may be amortized over the life of the bonds and deducted ratably

each year. *Helvering* v. *Union Pacific Co., supra; Gt. W. Power Co.* v. *Commissioner,* 297 U. S. 543. The theory of the deductions, whether regarded as expenses or losses, or additions to the effective interest rate, is that the discount and expense reduce by their amount the capital realized by the taxpayer from the bond issue, and, while they come out of the pocket of the taxpayer only upon the payment of the bonds at maturity, the loss which is definite as to its date and amount may properly be amortized over the life of the bonds. In the *Union Pacific Co.* case, *supra,* this Court said (pp. 286, 287):

> Both commissions and discount, as the Government concedes, are factors in arriving at the actual amount of interest paid for the use of capital procured by a bond issue. The difference between the capital realized by the issue and par value, which is to be paid at maturity, must be added to the aggregate coupon payments in order to arrive at the total interest paid. Both discount and commissions are included in this difference. If the difference be viewed as a loss resulting from the funding operation, it is one which is realized only upon the payment of the bonds at maturity.
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> * * * We think that the revenue acts, as they have been interpreted by this Court and the treasury regulations upon this and related subjects, require that this difference between receipts and disbursements of the

taxpayer should, in some form, enter into the computation of his taxable income. It is a loss to the taxpayer, definite as to its date and amount, and represents a part of the cost of the borrowed capital during each year of the life of the bond issue. Cf. *United States* v. *Anderson, supra*. At least where the taxpayer's books are kept upon the accrual basis, its final disbursement may be anticipated by amortization and the amortized amount deducted annually from his gross income.

Article 68 of Regulations 74 further provides that if after issuing bonds at a discount, the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any amount of discount not yet deducted) is a deductible expense for the taxable year. Under these regulations when a corporation retires bonds issued at a discount at par or for a premium, the courts have held that it is entitled to deduct the portion of the bond discount and expense which has not previously been deducted. *Gt. W. Power Co.* v. *Commissioner, supra; San Joaquin Light & Power Corp.* v. *McLaughlin*, 65 F. (2d) 677 (C. C. A. 9th); *Helvering* v. *California Oregon Power Co.*, 75 F. (2d) 644 (App. D. C.); *Helvering* v. *Union Public Service Co.*, 75

F. (2d) 723 (C. C. A. 8th); *Helvering* v. *Central States Electric Corp.*, 76 F. (2d) 1011 (C. C. A. 2d).

In 1928 the Metropolitan Edison Company retired at a premium bonds which had been issued at a discount by its subsidiaries, the Cumberland Valley Light & Power Company, the York Haven Water & Power Company, the Hanover Power Company, and the Pennsylvania Edison Company, and there was then outstanding unamortized bond discount and expense amounting in the aggregate to $752,481.26. (R. 34.) That item would admittedly be deductible in the returns of the subsidiaries if they had continued in existence and redeemed the bonds, or it would have been deductible by the Metropolitan Edison Company if it had issued the bonds. But that is not the situation. The deduction is claimed by the Metropolitan Edison Company which did not issue the bonds although it did redeem them after it assumed the obligation to pay them.

The only two theories which would support the allowance of a deduction in such a situation are: (1) That the statutes and regulations permit a successor to claim deductions which its predecessor might have claimed if it had continued in existence, and (2) that the agreement to pay off the bonds at maturity caused a loss to the successor which is measured by the unamortized bond discount and expense at the time of their redemption. We submit that neither theory is sound.

This Court has repeatedly held that a taxpayer may not claim a deduction which the statute in terms grants to another. *Planters Oil Co.* v. *Hopkins*, 286 U. S. 332; *Welch* v. *Helvering*, 290 U. S. 111; *Burnet* v. *Clark*, 287 U. S. 410; *New Colonial Co.* v. *Helvering*, 292 U. S. 435. It has also recognized that the fact that one corporation has taken over the assets of another and agreed to assume its liabilities does not mean that it is to be granted the deductions which its predecessor might have had if it had continued in existence. *New Colonial Co.* v. *Helvering, supra.* Separately organized corporations are separate entities for tax purposes and except in so far as the statutes themselves provide that a successor is to be identified with its predecessor (for example, in the case of gains or losses arising from sales after a reorganization), the successor is not identified with the predecessor and may not take the deductions to which the latter would have been entitled.

The statutes and regulations here involved do not create any exception to the general rule. The regulations do not provide that a successor corporation shall be permitted to deduct amortization of bond discount and expense with respect to bonds issued by its predecessor. See Article 68 of Regulations 74 (Appendix A, *infra*, p. 58). They grant the deduction in terms only to the corporation issuing the bonds. Moreover the statutes authorizing deductions for losses, interest, and expenses, under

one or more of which amortization of bond discount and expense is deductible, refer to losses sustained and expenses and interest paid by a particular taxpayer. Hence it is not enough to say that because the subsidiaries might have claimed the deduction for amortization of bond discount and expense and might have deducted the unamortized bond discount and expense upon the retirement of the bonds, the Metropolitan Edison Company as their successor may claim the same deductions.

If there were any doubt on this question it would be removed by a consideration of the cases in which it has been held that a successor corporation taking over the assets of a corporation and assuming its liabilities by agreement, is not entitled to deductions for losses which the predecessor might have claimed if it had continued in existence.

New Colonial Co. v. *Helvering,* 292 U. S. 435, involved the question whether a successor corporation could deduct a net loss sustained by its predecessor. Both corporations had been organized under the laws of New York to engage in the same business and by agreement the new corporation took over the assets and agreed to assume the liabilities of the predecessor. No cash was involved in the transaction. The agreement included provisions for the issuance of stock by the new company to the old equal in class, par value, and number of shares to the outstanding stock of the old company, so that the old company could make an exchange, share for share, with its stockholders and thereby

retire its outstanding stock. The existence of the old company was continued something more than a year before it was dissolved, though after the transfer it transacted no business and had no assets. The Court held that the net loss sustained by the predecessor could not be deducted by the taxpayer, for the reason that it was a different taxpayer. It stated that the statutes dealing with the recognition of gain or loss from reorganizations did not touch the problem and that it was unimportant that the continuity of the enterprise was preserved or that the stockholders and creditors were substantially the same as before the transfer. The Court said in part (p. 439):

> The petitioner insists that the continuity of the business was not broken by the transfer from the old company to the new; and this may be conceded. But it should be observed that this continuity was accomplished by deliberate elimination of the old company and substitution of the new one. Besides, the matter of importance here, as will be shown presently, is not continuity of business alone but of ownership and tax liability as well. Had the transfer from one company to the other been effected by an unconditional sale for cash there would have been continuity of business, but not of ownership or tax liability.

Other cases to the same effect are: *Athol Mfg. Co.* v. *Commissioner*, 54 F. (2d) 230 (C. C. A. 1st); *Brandon Corp.* v. *Commissioner*, 71 F. (2d) 762

(C. C. A. 4th); *Cem Securities Corp.* v. *Commissioner*, 72 F. (2d) 295 (C. C. A. 4th), certiorari denied, 293 U. S. 613; *May Oil Burner Corp.* v. *Commissioner*, 71 F. (2d) 644 (C. C. A. 4th); *Shreveport Producing & Refining Co.* v. *Commissioner*, 71 F. (2d) 972 (C. C. A. 5th), certiorari denied, 293 U. S. 616. These decisions are in accord with the general theory that the separate entity of a corporation cannot be disregarded to give another corporation or individual the benefit of a deduction. *Dalton* v. *Bowers*, 287 U. S. 404; *Burnet* v. *Clark*, 287 U. S. 410; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415; *Planters Oil Co.* v. *Hopkins*, 286 U. S. 332.

It may be argued that the *New Colonial Co.* case, *supra*, and other cases cited in connection therewith are distinguishable because they dealt with net losses, the deduction of which is specifically limited to the taxpayer sustaining the loss. But the *Athol Mfg. Co.* case involved not only the question whether the successor could deduct net losses sustained by the predecessor, but also the question whether the successor could deduct amounts paid to satisfy the obligations of its predecessor which it had agreed to pay, and the court held that the latter amounts could not be deducted.[9] The only

[9] In *Shreveport Producing & Refining Co.* v. *Commissioner*, *supra*, it was held that the successor corporation could not deduct a loss on stock taken over from its predecessor because the stock was worthless when acquired and no loss fell upon the successor.

distinction between that case and these is that here the taxpayers are not seeking to deduct the total amount paid to retire the obligations assumed, but are claiming that by virtue of their assumption of those obligations they are entitled to deduct unamortized bond discount and expense which their predecessors might have claimed. In neither case is the deduction allowable.

Upon the general reasoning of this Court in the *New Colonial Co.* case, *supra*, it is possible to argue that even in the case of a true merger or consolidation having the incidents which have been described, the successor is nevertheless to be regarded as a separate taxable entity and is not entitled to deductions for losses or for amortization of bond discount or expense which would have been allowable to its predecessor if it had continued in business, although the Court did point out that there the transaction was voluntary and contractual and not by operation of law. In the *Athol Mfg. Co.* case, *supra*, and in most of the cases cited above in connection therewith, it was not intimated that there would be a difference if there were a true merger or consolidation. But see *Brandon Corp.* v. *Commissioner, supra*, where three corporations were consolidated under a South Carolina statute which did not preserve the identity of the absorbed corporations, and the court suggested that a different question might have arisen if there had been a merger such as the one involved in *Western Maryland Ry. Co.* v. *Commissioner, supra.*

Notwithstanding that *dictum* we believe the courts would have been justified in holding that in no case is a successor corporation entitled to the deduction. But they have not gone that far. They have allowed amortization of bond discount and expense with respect to bonds issued by a predecessor where there was a strict merger or consolidation, upon the theory that in such cases the identity of the corporation was essentially preserved so that in substance it was the same corporation that issued the bonds. Thus, in *American Gas & Elec. Co.* v. *Commissioner, supra,* the court, in holding that the Appalachian Electric Power Company might deduct amortization of bond discount with respect to bonds issued by the Appalachian Power Company, said in part (85 F. (2d) at 530–531):

> But the situation of the bonds of the Appalachian Power Company is different. Under the decisions of *New York Central R. Co.* v. *Commissioner,* 79 F. (2d) 247 (C. C. A. 2), and *Western Maryland R. Co.* v. *Commissioner,* 33 F. (2d) 695 (C. C. A. 4), deductions should be allowed in the case of those bonds if there was a merger of Appalachian Power Company in the Appalachian Electric Power Company which essentially preserved the identity of the transferor. In *Langhorne* v. *Richmond Ry. Co.* (1895), 91 Va. 369, at pages 374, 375, 22 S. E. 159, 161, where there had been a consolidation, the court said:

"The corporation which is created by such consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name or under the name of the surviving company for their debts as if no change had been made in the name or in the organization of the original corporation. * * *

"Since, by authority of law and the act of the parties, the consolidated corporations are moulded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities."

The decisions of the Virginia Court of Appeals in *American Ry. Exp. Co.* v. *Downing* (1922) 132 Va. 139, 111 S. E. 265 and in *American Ry. Exp. Co.* v. *Fleishman, Morris & Co., Inc.* (1928) 149 Va. 200, 141 S. E. 253, as well as in the *Langhorne* decision, *supra*, seem to show that, where there is a merger or consolidation under the Virginia law, the transferee corporation succeeds by operation of law to all the rights and liabilities of the former company and carries forward its identity. The allowance of the deductions for the bonds of the Appalachian Power

Company is governed, then, by our decision in *New York Central R. Co.* v. *Commissioner, supra.*

To the same effect are the decisions in *Western Maryland Ry. Co.* v. *Commissioner, supra,* and *New York Cent. R. Co.* v. *Commissioner, supra.*

We submit, therefore, that unless there is a statutory merger or consolidation which has the consequences attributed to the consolidation referred to in the above-quoted excerpt from the opinion in *American Gas & Elec. Co.* v. *Commissioner,* there is no basis for the argument that the successor corporation is the same taxpayer as the absorbed corporation which issued the bonds and is therefore to be allowed the deductions for amortization of bond discount and expense that the issuing corporation might have claimed. Where the merger or consolidation does not have those characteristics, the two corporations are separate entities and must be so regarded for tax purposes. *A fortiori,* a successor corporation is not to be regarded as the same taxpayer as its predecessor merely because it has purchased the latter's assets and agreed to pay its debts (*Turner-Farber-Love Co.* v. *Helvering, supra*), or because there has been a reorganization and both operate the same business or have the same stockholders (*New Colonial Co.* v. *Helvering, supra; American Gas & Elec. Co.* v. *Commissioner, supra*).

We submit, therefore, that there is no basis for the argument that the taxpayers in these cases should be allowed the deductions claimed for the reason that their subsidiaries might have claimed them if they had continued in existence. They are separate entities from their former subsidiaries and are to be treated separately for tax purposes.

Most of the courts which have permitted a corporation resulting from a true merger or consolidation to deduct amortization of bond discount and expense with respect to bonds of an absorbed corporation have done so upon the theory that the identity of the issuing corporation was preserved, and not upon the theory that the successor considered as a separate corporation sustained a loss of its own. *American Gas & Electric Co.* v. *United States, supra; American Gas & Elec. Co.* v. *Commissioner, supra; Western Maryland Ry. Co.* v. *Commissioner, supra.* It is true that in *New York Cent. R. Co.* v. *Commissioner, supra* (p. 249), the court suggested that no loss was sustained by issuing the bonds at a discount, and that the loss would be sustained by the consolidated corporation when the bonds matured and were paid. But the court that decided that case repudiated that suggestion in *American Gas & Elec. Co.* v. *Commissioner, supra,* holding that, notwithstanding the transfer of assets and the assumption of liabilities in a reorganization, the loss was still that of the issuing corporation.

We submit that the latter conclusion is the only sound one. The theory upon which the deduction for amortization of bond discount and expense is based, is that the discount and expense have resulted in the issuing corporation's realizing less from the sale of the bonds than it will be obliged to pay the bondholders at maturity. If it redeems the bonds at par or at a premium before maturity, it may write off the rest of the loss at that time. But if the corporation that redeems the bonds did not issue them, there are not present the two elements in the transaction which give rise to the loss. To say that it has sustained a loss because it has agreed to pay them off at maturity is like saying that one realizes a loss from a purchase without a subsequent sale, or from a short sale without a subsequent purchase. Whether or not a loss has been sustained upon the redemption of the bonds depends upon the events which occurred when the bonds were issued, but the successor corporation has no connection with those events. It did not incur any expense in issuing the bonds, it did not issue them at a discount, and it did not receive the proceeds of their sale. It, therefore, cannot establish its right to the deduction.[10]

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[10] Attention is called to the fact that the Board of Tax Appeals allowed the Metropolitan Edison Company to deduct the premium paid upon the bonds at their maturity, upon the ground that that was an expense incurred for its own benefit. (R. 37–39.) The same reasoning does not apply to the unamortized bond discount and expense.

In a case where the transfer is effected by a sale, the obligation to pay off the bonds at maturity is merely a part of the price paid by the successor for the assets taken over. *United States* v. *Hendler*, 303 U. S. 564. Even if the value of the assets received is less than what was given for them (including the total of the predecessor's obligations which it is to pay), no loss has then been realized. When the loss is realized, its amount and deductibility will depend upon and be measured by statutes dealing with the recognition and computation of gains from sales. If, however, the transfer is effected pursuant to an exchange, a loss from the exchange may have been realized at the time of the transfer, but its recognition depends upon provisions relating to gain or loss from exchanges. In neither case does the successor sustain a loss measured by the unamortized discount and expense.

We submit, therefore, that the established rule that no corporation other than the one issuing the bonds may deduct amortization of bond discount and expense is sound and that no additional exceptions are warranted by the applicable statutes and regulations.

III

THE AGREEMENT BY WHICH THE METROPOLITAN EDISON COMPANY PURCHASED THE ASSETS OF THE METROPOLITAN POWER COMPANY AND ASSUMED ITS OBLIGATIONS WAS NOT MADE PURSUANT TO ANY PENNSYLVANIA STATUTE, THERE WAS NO MERGER OR CONSOLIDATION OF ANY CHARACTER, AND THE FORMER COMPANY MAY NOT DEDUCT UNAMORTIZED BOND DISCOUNT AND EXPENSE WITH RESPECT TO THE LATTER'S BONDS UPON THEIR REDEMPTION

The court below held that in its return for 1927 the Metropolitan Edison Company (the taxpayer) was entitled to deduct unamortized discount and expense with respect to certain bonds of the Metropolitan Power Company which it retired that year at a premium. The circumstances relating to the redemption of those bonds in general resemble those relative to the redemption in 1928 of bonds issued by other corporations whose assets the taxpayer acquired, except for the fact that the agreement by which the taxpayer acquired the assets and assumed the liabilities of the Metropolitan Power Company was not entered into pursuant to any Pennsylvania statute. In view of that fact, the question as to whether the deduction should be allowed with respect to those bonds does not depend in any way upon the construction of Section 595, Title 15, of Purdon's Pennsylvania Statutes (Appendix B, *infra*, p. 64).

The Board's findings disclose that in February, 1927, the Public Service Commission of the State

of Pennsylvania issued a Certificate of Public Convenience authorizing the Metropolitan Power Company to sell all of its assets except public franchises (of which there were none) to the taxpayer, which owned all of its stock and had previously guaranteed a $3,250,000 issue of its bonds. (R. 31–32.) All assets and liabilities were transferred as they stood upon the books of the one company to the books of the other, and a deficit in operations was charged against the surplus of the taxpayer. (R. 32.) The taxpayer surrendered its capital stock in the Metropolitan Power Company for cancellation, and the latter became inactive about February 28, 1927, although it was not dissolved until January 8, 1928. (R. 32.)

Among other liabilities, the taxpayer assumed liability for the payment of the $3,250,000 bond issue previously mentioned. It redeemed those bonds at a premium during the latter part of 1927, at which time there were unamortized discount and expense amounting to $308,097.90. (R. 32–33.)

It was admitted before the Board (R. 39–40) and in the court below (R. 54) that this transfer of assets did not take place pursuant to any Pennsylvania statute. Notwithstanding that fact, the court below held that there was a merger, and that the taxpayer was entitled to the deduction claimed. It stated that there was a *de facto* dissolution of the subsidiary and that in other respects the transaction had the same consequences as a transfer made under Section 595.

We have shown in Point I of the Argument that a transfer of assets under Section 595 constitutes a sale, rather than a merger, and that even if it should be called a merger for some purposes, it is not a true merger which preserves the identity of the transferor within the transferee and makes the transferee liable for the debts of the transferor by operation of law. If our conclusions as to the proper construction of Section 595 are correct, it follows that the court below erred in assuming that because the transactions involving the Metropolitan Edison Company and the Metropolitan Power Company resembled transactions carried out pursuant to Section 595, there was a merger of those two companies. But even if our conclusions concerning Section 595 were erroneous, it would not follow that there was a merger.

It is well settled that there can be no merger by mere agreement and contract between two corporations. In addition there must be a positive authorization by the statutes of the particular State. *Clearwater* v. *Meredith,* 1 Wall. 25; *Pearce* v. *Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.,* 21 How. 441; *First State Bank of Mangum* v. *Lock,* 113 Okla. 30, 33; *North American Union* v. *Johnson,* 142 Ark. 378; *Greenville Compress* v. *Planters' Press,* 70 Miss. 669; *Traction Co.* v. *Offutt,* 17 App. D. C. 292; 15 Fletcher, Cyclopedia Corporations (Perm. Ed.), c. 61, Sec. 7045, pp. 22–24. That is the law of Pennsylvania. *Lauman* v. *The Lebanon Valley Rail-*

road Co., 30 Pa. 42. In the latter case, with reference to the proposed consolidations of two corporations, Mr. Chief Justice Lowrie said (p. 44):

> No one will deny that, without the authority of the legislature, neither of these companies has power to enter into such a contract; for, as corporations, their powers are strictly limited to the province marked out for them in their charters.

We submit, therefore, that there was no merger or consolidation of the taxpayer (the Metropolitan Edison Company) and the Metropolitan Power Company, in whatever sense that term may be used. Much less was there a merger in the sense that the identity of the latter company was continued within the taxpayer, or in the sense that the former became liable for the debts of the latter by operation of law. While the court below stated that there was an assumption of debts by operation of law, it cited no cases in support of that view, and we know of none. Cf. *Merwine* v. *Mt. Pocono Light & Imp. Co., supra.* The court did not state that the existence of the Metropolitan Power Company was continued in the taxpayer. Moreover, it conceded that the Metropolitan Power Company was not dissolved until 1928, so that it is clear that its existence could not have been merged into that of the Metropolitan Edison Company during 1927. The *de facto* dissolution to which the court referred could not accomplish such a result.

We submit, therefore, that upon the principles set forth in Points I and II, *supra*, there was no authority under the statutes or the regulations for permitting the taxpayer to deduct the unamortized discount and expense with respect to bonds issued by the Metropolitan Power Company. The statute and regulations applicable to the year 1927 are no different from those applicable to the year 1928 which have been discussed hitherto. See Sections 200 (d), 212 (b), 232, and 234 (a), (1), (2), and (4) of the Revenue Act of 1926 (Appendix A, *infra*, pp. 56–57), and Articles 545 and 563 of Regulations 69 (Appendix A, *infra*, p. 60).

Under those statutes and regulations the taxpayer is clearly not entitled to the deductions for amortization of bond discount and expense with respect to bonds issued by another corporation whose obligations it agreed to pay.

CONCLUSION

The decisions of the court below should be reversed.

Respectfully submitted.

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APPENDIX A

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.

* * * * *

(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22 (c).)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

SEC. 48. DEFINITIONS.
When used in this title—

* * * * *

(c) *Paid, incurred, accrued.*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 200. WHEN USED IN THIS TITLE—

* * * * *

(d) The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212 or 232. The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed under section 212 or 232, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

* * * * *

SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 232. In the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by sections 234 and 206, and the net income shall be computed on the same basis as is provided in subdivisions (b) and (d) of section 212 or in section 226. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the computation shall also be made in the manner provided in section 217.

* * * * *

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

(2) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise. * * *

* * * * *

Treasury Regulations 74:

ART. 68. *Sale and retirement by corporation of its bonds.*—(1) (*a*) If bonds are issued by a corporation at their face value, the corporation realizes no gain or loss. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price or face value, the excess of the purchase price over the issuing price or face value is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year.

(2) (*a*) If bonds are issued by a corporation at a premium, the net amount of such premium is gain or income which should be prorated or amortized over the life of the bonds. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price minus any amount of premium already returned as income, the excess of the purchase price over the issuing price minus any amount of premium already returned as income (or over the face value plus any amount of premium not yet returned as income) is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price minus any amount of premium already returned as income, the excess of the issuing price minus any amount of premium already returned as income (or of the face value plus any amount of premium not yet returned as income) over the pur-

chase price is gain or income for the taxable year.

(3) (*a*) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any amount of discount not yet deducted) is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price plus any amount of discount already deducted (or of the face value minus any amount of discount not yet deducted) over the purchase price is gain or income for the taxable year.

ART. 176. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. (See article 66.) If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. (See article 68.) Any loss sustained by a corporation upon the sale of its capital assets, computed as provided in sections 111–113 and articles 561–604, subject to the limitation provided in section 118 as to the purchase and sale of stock or securities, is deductible.

Treasury Reguations 69:

[Inasmuch as Articles 545 and 563 of these Regulations are identical in all material respects with Articles 68 and 176 of Regulations 74 above quoted, they are not set forth separately.]

APPENDIX B

Purdon's Pennsylvania Statutes, Annotated (Permanent Edition), Title 15:

SEC. 421. *Merger authorized; exceptions; exclusive franchise not extended; merger subject to act of 1907.*

It shall be lawful for any corporation, now or hereafter organized under the provisions of any general or special act of Assembly authorizing the formation of any corporation or corporations, to merge its corporate rights, franchises, powers, and privileges with and into those of any other corporation or corporations transacting the same or a similar line of business, so that by virtue of this act such corporations may consolidate, and so that all the property, rights, franchises, and privileges then by law vested in either of such corporations, so merged, shall be transferred to and vested in the corporation in which such merger shall be made:

* * *

SEC. 422. *Procedure; joint agreement; approval by stockholders; certificates; approval by governor.*

Said merger or consolidation shall be made under the conditions, provisions, and restrictions, and with the powers, herein set forth; to wit,—

First. The directors of each corporation shall enter into a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporations; prescribing the terms and conditions thereof, the mode of carrying the same into

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effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers, and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of said corporations into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect the said consideration and merger; but said agreement shall not be effective unless the same shall be approved by the stockholders of said corporations in the manner hereinafter provided.

Second. Said agreement shall be submitted to the stockholders of each of said corporations, at separate special meetings or at any annual meetings, of the time, place and object of which respective meetings due notice shall be given by publication, once a week for two consecutive weeks before said respective meetings, in at least one newspaper in the county or in each of the counties in which the principal office of said respective corporations shall be situate,—excepting in the case of the merger or consolidation of corporations which, upon their original incorporation, are required by the Constitution to publish notice of intention to incorporate for a longer period than two weeks, in which case notice by publication shall be as required by the Constitution,—and at said meetings the said agreement of the directors shall be considered, and a vote of the stockholders in person or by proxy shall be taken, by ballot, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote; and if a majority in

amount of the entire capital stock of each of said corporations shall vote in favor of said agreement, merger and consolidation, then that fact shall be certified by the secretary of each corporation, under the corporate seal thereof, and said certificates, together with the said agreement or a copy thereof, shall be filed in the office of the Secretary of the Commonwealth, who shall forthwith present the same to the Governor for his approval and when approved by the Governor the said agreement shall be deemed and taken to be the act of consolidation of said corporation.

SEC. 423. *Effect of merger; new patent; bonus; certificate of reports and payment of taxes.*

Upon the filing of said certificates and agreement, or copy of the agreement, in the office of the Secretary of the Commonwealth, and upon the issuing of new letters patent thereon by the Governor, the said merger shall be deemed to have taken place, and the said corporations to be one corporation under the name adopted in and by said agreement possessing all the rights, privileges, and franchises theretofore vested in each of them; and all the estate and property, real and personal, and rights of action, of each of said corporations, shall be deemed and taken to be transferred to and vested in the said new corporation, without any further act or deed: *Provided,* That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all

debts not of record, duties, and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties, and liabilities had been contracted by it. But such merger and consolidation shall not be complete, and no such consolidated corporation shall do any business of any kind, until it shall have first obtained from the Governor of the Commonwealth new letters patent, and shall have paid to the State Treasurer a bonus, as prescribed by law, upon all its capital stock in excess of the amount of capital stock of the several corporations so consolidating, upon which the bonus required by law has been theretofore paid: *And provided further*, That new letters patent of such consolidated corporation shall not be issued by the Governor of the Commonwealth, until each corporation entering into and forming the consolidated corporation shall have filed with the Secretary of the Commonwealth a certificate from the Auditor General of the Commonwealth, setting forth that all reports required by the Auditor General of the Commonwealth have been duly filed to the date of the proposed merger, and that all taxes due the Commonwealth of Pennsylvania have been paid, up to and including said date.

SEC. 595. *Reduction of capital stock; change in value of shares; conveyance of franchise and property.*

Any corporation created under the provisions of this act, and any corporation of the classes named in the second section hereof, that is now in existence by virtue of any law of this Commonwealth, may reduce its capi-

tal stock or alter and change the par value of the shares thereof, by a vote of the stockholders taken in the manner and under the regulations prescribed in the eighteenth, nineteenth, twentieth, twenty-first and twenty-second sections of this act; and it shall be lawful for any corporation in the same manner to sell, assign, dispose of and convey to any corporation created under or accepting the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid: Provided, That the returns required by said section shall not be filed in the office of the Secretary of the Commonwealth until each and every corporation, so selling, assigning, disposing, and conveying such franchises and property, shall have filed with the Secretary of the Commonwealth a certificate from the Auditor General of the Commonwealth, setting forth that all reports required by the Auditor General of the Commonwealth have been duly filed to the date of the proposed sale, assignment, disposition and conveyance; and that all taxes due the Commonwealth of Pennsylvania have been paid up to and including such date: * * *

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